Circuit Court for Prince George's County
Case No. CJ181473

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1419

September Term, 2019

EDWARD FELTON

v.

STATE OF MARYLAND

Beachley,
Gould,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: July 6, 2020

On October 4, 2017, Edward Wayne Felton, appellant, was driving his 2012 Lexus SUV northbound on Route 202 in Largo, Maryland, when he ran into the back of a vehicle driven by Karen Scott-Black while she was stopped for a stoplight at the intersection of Route 202 and Lottsford Road. Scott-Black called 911, and Maryland State Trooper Norman Murray responded to the scene of the accident. After conducting an investigation, Trooper Murray arrested appellant and charged him with driving while impaired by a controlled dangerous substance (phencyclidine ("PCP")); driving while impaired by drugs or alcohol; failure to control the speed of a motor vehicle to avoid a collision; reckless driving; and negligent driving.

On June 27, 2018, appellant entered pleas of not guilty to all charges in the District Court of Maryland for Prince George's County and prayed a jury trial. The case was transferred to the Circuit Court for Prince George's County.

On November 26, 2018, appellant appeared before the circuit court and, through counsel, advised the court that he was prepared to waive his right to a jury trial. A bench trial was held the same day, at the conclusion of which the court found appellant guilty of all charges, except reckless driving. On June 27, 2019, appellant was sentenced to incarceration for one year, with all but ninety days suspended, and three years of supervised probation on the conviction for driving while impaired by a controlled dangerous substance. The court merged all of the other convictions for sentencing purposes. On July

24, 2019, appellant filed a notice of appeal, as well as a motion for reconsideration of sentence. The circuit court denied the motion for reconsideration on August 1, 2019.[1]

On appeal, appellant presents six issues for our review,[2] which we have rephrased as questions:

[1] In his brief, appellant informed us that he has served the entire ninety-day term of imprisonment and is currently on supervised probation.

[2] As stated in appellant's brief, appellant's issues presented read:

1. Whether the trial court committed reversible error by conducting a non-jury trial despite appellant's right to a trial by jury, when the trial court did not make any examination of appellant on the record in open court to determine whether the waiver of the right to trial by jury was made knowingly and voluntarily as required by Maryland Criminal [sic] Rule 4-246[.]

2. Whether the trial court committed reversible error by allowing a Maryland State trooper who was not a Drug Recognition Expert, and had limited training in drug detection, where the trooper was allowed to testify (despite defense counsel's objection), that sweet smell emanating from appellant's breath and pores indicated that appellant was under influence of phencyclidine (PCP), even though [the] trooper was not an expert as required by Maryland Criminal [sic] Rule 5-702, and testimony did not qualify as proper opinion testimony by a lay witness as required by Maryland Criminal [sic] Rule 5-701[.]

3. Whether the trial court committed reversible error by allowing Maryland State Trooper Murray to testify that a vial the trooper recovered from appellant, pursuant to a warrantless search, contained the controlled substance phencyclidine (PCP), where the trooper was not an expert, and the vial was not admitted into evidence by the State, and no explanation for the unavailability of the vial was given by the State and, appellant's counsel objected that the trooper's testimony was inadmissible and violated appellant's right of confrontation, and was improper lay opinion testimony in violation of Maryland Criminal [sic] Rules 5-701, and 5-702[.]

4. Whether the trial court committed reversible error by allowing (despite objection by appellant's counsel), the State Trooper to testify that appellant admitted that he had recently consumed phencyclidine (PC[P]), where the

I. Did the trial court err by accepting appellant's waiver of a jury trial without determining whether appellant waived his right to a jury trial knowingly and voluntarily?

II. Did the trial court err by allowing Trooper Murray to testify as to whether a sweet smell emanating from appellant indicated that appellant was under the influence of PCP?

III. Did the trial court err by allowing Trooper Murray to testify that a vial found in appellant's SUV contained PCP?

IV. Did the trial court err by allowing Trooper Murray to testify that appellant admitted to taking PCP recently?

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alleged statement was made in response to custodial interrogation; even though the trooper admitted that he had not given appellant the advice of the rights to counsel under the Sixth Amendment to the United States Constitution, and right against self-incrimination as provided by the Fifth Amendment to the United States Constitution, as required by *Miranda v. Arizona*[.]

5. Whether the trial court committed reversible error by allowing Trooper Norman Murray to testify (over defense objection) and provide an opinion with respect to the mental state and condition of appellant in a criminal case in which appellant was charged with Driving While Impaired By Drugs, where the trooper's opinion was that appellant was impaired by and under the influence of phencyclidine (PCP)[,] which constituted an element of the crime in violation of Maryland Criminal [sic] Rule 5-704(b)[.]

6. Whether, pursuant to Maryland Rule 8-131, the weight of the evidence was insufficient to establish guilt where Trooper Murray's training in drug detection did not establish an adequate basis for the trooper's testimony that appellant was impaired by phencyclidine, the trooper was not a Drug Recognition Expert, the trooper was not an expert in chemical analysis of drugs, the trooper testified over objection that a vial seized from appellant's vehicle contained PCP, the vial was never produced in evidence, no explanation of the vial's absence was provided by the State, and no forensic evidence such as blood tests, urinalysis, or field test results were admitted in evidence at trial[.]

V. Did the trial court err by allowing Trooper Murray to opine that appellant was impaired by and under the influence of PCP, which constituted an opinion on the ultimate issue?

VI. Was the evidence legally sufficient to support appellant's convictions?

We answer the first and third questions in the affirmative and the fifth question in the negative. We do not address the second and fourth questions because appellant did not set forth any argument on those questions as required by Maryland Rule 8-504(a)(6). Although appellant also failed to provide argument on the sixth question, we nevertheless answer that question in the affirmative. We therefore vacate the judgment of the circuit court and remand this case to that court for further proceedings.

BACKGROUND

On October 4, 2017, appellant drove his 2012 Lexus SUV northbound on Route 202 in Largo, Maryland, toward the intersection of Route 202 and Lottsford Road. At that intersection, a white Lexus, which was driven by Scott-Black, was in the left turn lane of Route 202 stopped at the stoplight. As appellant's "vehicle slowly approached the left turn traffic signal, appellant's vehicle bumped into the rear of the white Lexus SUV. . . ." Scott-Black got out of her vehicle and "gestured" to indicate "[h]ow did you hit me?" Appellant "just kind of smirked at" Scott-Black, and Scott-Black dialed 911. Appellant then proceeded to get out of his vehicle and "seemed to have trouble walking" and "was sort of staggering and had to hold onto his vehicle." Appellant did not cause any damage to Scott-Black's vehicle. Scott-Black remained in her vehicle while she waited for the police to arrive.

In response to Scott-Black's 911 call, Trooper Murray arrived at the scene of the accident. Upon arrival at the scene and after speaking with appellant, Trooper Murray observed that appellant's eyes were red and glassy, and appellant was "unsteady on his feet." When Trooper Murray asked appellant what happened, "[appellant] was just holding down his head" and "was sweating . . . profusely." Trooper Murray smelled "[a] sweet odor of a chemical substance" "emanating from [appellant's] breath and pores." Trooper Murray identified the chemical substance that he smelled as PCP, which is a controlled dangerous substance. Trooper Murray went back to his car to "notify dispatch" that he was "putting [appellant] on a series of field sobriety tests."

Appellant, however, "couldn't do [the field sobriety tests]," because he was "very incohesive [sic]" and "was just holding down his head." Trooper Murray had to "hold [appellant] up because he was very imbalanced." Trooper Murray then "decided to put [appellant] under arrest" "[f]or his safety" and for Trooper Murray's safety. Trooper Murray asked appellant if he had consumed any alcohol or drugs before driving, and appellant "verbally admitted that recently he took some PCP." The record is unclear as to whether Trooper Murray actually placed appellant under arrest before Trooper Murray asked appellant whether he had consumed any drugs. Trooper Murray did not read appellant his *Miranda* warnings at that time.

Trooper Murray conducted "a search incident to arrest" and "found a vial of a substance which [he] determined to be PCP." Trooper Murray put the vial into his vehicle and then "escorted" appellant to Trooper Murray's vehicle. While in route to the police barracks, appellant started wheezing and complained, "Trooper, I'm having a severe chest

pain." Trooper Murray "radioed the barrack to call for the ambulance to meet us at the barrack[s]." The ambulance arrived at the barracks shortly after Trooper Murray and appellant. The paramedics placed appellant on a gurney, and Trooper Murray read appellant his "advice of rights." Both appellant and Trooper Murray signed the advice of rights form. Appellant initially indicated that he would submit to an intoximeter exam, but subsequently changed his mind.

The ambulance took appellant to Southern Maryland Hospital ("the hospital"). About two hours later, Trooper Murray went to the hospital, but appellant had been discharged before Trooper Murray arrived.

Trooper Murray charged appellant with failure to control the speed of a motor vehicle to avoid a collision under TR § 21-801(b), negligent driving under TR § 21-901.1(b), reckless driving under TR § 21-901.1(a), driving while impaired by a controlled dangerous substance under TR § 21-902(d), and driving while impaired by drugs or alcohol under TR § 21-902(c)(1). On June 27, 2018, appellant entered not guilty pleas to all charges in the district court and requested a jury trial. The case was transferred to the circuit court.

On November 26, 2018, appellant appeared for trial in the circuit court. Appellant's counsel told the court that "[appellant] is prepared to waive his right to a jury and proceed non-jury." The court responded "Okay," and without any further inquiry into appellant's waiver of the jury trial, the court began a bench trial. The State called Scott-Black and Trooper Murray as its only witnesses. The State did not present any expert testimony regarding a chemical analysis of the contents of the vial.

At the conclusion of the State's case, appellant moved for a "judgment of acquittal certainly with respect to the two jailable offenses: driving while impaired under drugs; or driving while so impaired under drugs that he could not control a motor vehicle." The trial court reserved on the motion, and after appellant rested his case without introducing any evidence, the court rendered its verdict. The court found appellant guilty of Count I, failure to control the speed of a motor vehicle to avoid a collision; Count II, negligent driving; Count IV, driving while impaired by a controlled dangerous substance; and Count V, driving while impaired by drugs or alcohol. The court did not find that the State had presented sufficient evidence to "conclude that there was a wanton or willful disregard, even if [appellant] may be impaired, and the Court [found appellant] not guilty as to Count III, reckless driving."

On June 27, 2019, appellant was sentenced to one year of imprisonment, with all but ninety days suspended, and three years of supervised probation. On July 24, 2019, appellant filed a notice of appeal, as well as a motion for reconsideration of sentence. On August 1, 2019, the court denied appellant's motion for reconsideration.

We will include additional facts as necessary to the disposition of this appeal.

DISCUSSION

I. Appellant's Jury Trial Waiver

Appellant contends that "Rule 4-246 requires the trial court to make an informed decision that the [defendant] that seeks to waive the right to a jury trial in a criminal case, is making a knowing and voluntary decision to waive the trial by jury." According to appellant, in order for the trial court to determine whether the defendant is knowingly and

voluntarily waiving his or her right to a trial by a jury, the trial court must conduct an examination of the defendant on the record in open court. Appellant argues that "[a]t no time prior to the beginning of the trial, or during the trial, did the trial court conduct an examination of appellant or make a determination that the jury trial waiver was knowing and voluntary."

The State agrees with appellant that "the trial court erred by accepting [appellant]'s jury trial waiver because the record does not demonstrate that the waiver was knowing and voluntary." The State explains that "[t]he record below does not demonstrate that [appellant] had 'some knowledge' of his right to a jury trial when his waiver of the right was accepted by the trial court." The State points out that, after appellant's counsel stated that appellant was "prepared to waive his right to a jury," "the trial court asked no follow-up questions," and appellant "never said anything." Thus, "[b]ecause the record does not demonstrate that the trial court had an adequate basis for finding that the waiver of the right to a jury trial was knowing and voluntary, the State must agree that reversal is warranted." We also agree.

"The Sixth Amendment to the U.S. Constitution guarantees the right to a trial by an impartial jury in criminal matters. This right has been incorporated into the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, and is thereby applicable to Maryland and the several states." *Owens v. State*, 399 Md. 388, 405 (2007) (footnote omitted). The "Maryland Constitution also provides for the right to a jury trial in several articles of its Declaration of Rights." *Id.* Nevertheless, "[i]t is well-settled that the right to a jury trial may be waived either by entering a guilty plea, or by a criminal defendant's

election to be tried by a judge in accordance with Maryland Rule 4-246." *Smith v. State*, 375 Md. 365, 377 (2003). Md. Rule 4-246(b) states in part:

> The court may not accept the waiver until, after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, **the court determines and announces on the record that the waiver is made knowingly and voluntarily.**

(Emphasis added).

Although Rule 4-246 provides the basic procedure that must be followed, "[t]here is no fixed dialogue that must take place with a defendant to affect a valid outcome, but the court should ensure that the record demonstrates an intentional relinquishment of a known right." *Boulden v. State*, 414 Md. 284, 294 (2010). "A defendant's waiver of the right to a jury trial is knowing where the record shows that the defendant, who is represented by counsel, has 'some knowledge' of what a jury trial entails." *Ray v. State*, 206 Md. App. 309, 353 (2012), *aff'd*, 435 Md. 1 (2013).

Here, the record indicates, and both appellant and the State agree, that the trial court did not demonstrate that appellant had "some knowledge" of his right to a jury trial when his waiver was accepted by the court. The following dialogue occurred at trial:

[Appellant's Counsel]:	[Appellant] is prepared to waive his right to a jury and proceed non-jury.
The Court:	Okay. [Appellant's Counsel], why were you late because the State had all – everybody here. Are they here now?

The trial court made no further inquiry of appellant regarding whether appellant was knowingly and voluntarily relinquishing his right to a jury trial. "[T]he only appropriate

sanction for noncompliance with Rule 4-246 is a reversal." *Szwed v. State*, 438 Md. 1, 6 (2014). Accordingly, the trial court committed reversible error on this issue.[3]

II. Testimony Regarding the Sweet Smell Emanating from Appellant

In his second appellate issue presented, appellant asks:

> Whether the trial court committed reversible error by allowing a Maryland State trooper who was not a Drug Recognition Expert, and had limited training in drug detection, where the trooper was allowed to testify (despite defense counsel's objection), that sweet smell emanating from appellant's breath and pores indicated that appellant was under influence of phencyclidine (PCP), even though trooper was not an expert as required by Maryland Criminal [sic] Rule 5-702, and testimony did not qualify as proper opinion testimony by a lay witness as required by Maryland Criminal [sic] Rule 5-701[.]

No argument appears in appellant's brief on this issue.

This Court, and the Court of Appeals, have "consistently held that a question not presented *or argued* in an appellant's brief is waived or abandoned and is, therefore, not properly preserved for review." *Health Servs. Cost Review Comm'n v. Lutheran Hosp. of Md.*, 298 Md. 651, 664 (1984) (emphasis added); *Chang v. Brethren Mut. Ins. Co.*, 168

[3] To preserve for appellate review the issue of a trial judge's compliance with Rule 4-246(b), the defendant must make a contemporaneous objection. *See Nalls v. State*, 437 Md. 674, 693 (2014) (holding that "appellate courts will continue to review the issue of a trial judge's compliance with Rule 4-246(b) provided a contemporaneous objection is raised in the trial court to preserve the issue for appellate review"); *Spence v. State*, 444 Md. 1, 14–15 (2015) (holding that "a claimed failure of the court to adhere strictly with the requirements of Rule 4-246(b) requires a contemporaneous objection in order to be challenged on appeal"); *Meredith v. State*, 217 Md. App. 669, 674–75 (2014) (holding that, because "appellant made no objection below to the waiver procedure, to its content, or to the trial court's announcement as to the 'knowingly and intelligently' made waiver of his right to a jury trial[,] [h]is challenge to the effectiveness of his waiver [wa]s not preserved for our review and is not properly before this Court"). Here, the State does not raise, and thus we shall not address, any failure of appellant to object to the trial court's waiver procedure.

Md. App. 534, 550 n.7 (2006) (quoting *Beck v. Mangels*, 100 Md. App. 144, 149 (1994) (stating that "it is necessary for the appellant to present *and argue* all points of appeal in his initial brief")); Md. Rule 8-504(a)(6) (stating that a party must present "argument in support of the party's position"). Simply raising an issue in a question presented is insufficient for appellate review. *Fed. Land Bank of Baltimore, Inc. v. Esham*, 43 Md. App. 446, 457–58 (1979) (stating that "where a party initially raised an issue but then failed to provide supporting argument, this Court has declined to consider the merits of the question so presented but not argued"). Therefore, if an appellant fails to provide supporting argument for a question presented, an appellate court will not consider that question. *Health Servs. Cost Review Comm'n*, 298 Md. at 665. Because appellant did not argue in his brief that the trial court erred by allowing Trooper Murray to testify that the "sweet smell emanating from appellant's breath and pores indicated that appellant was under the influence of phencyclidine (PCP)," we will not address this issue.

III. Testimony that a Vial Found in Appellant's SUV Contained PCP

Appellant contends that the trial court erred by allowing Trooper Murray to testify that "he seized 'a vial of a substance [that] [he] determined to be PCP.'" Appellant argues that "[t]he State never produced the vial or its contents" and that "[t]he vial was never introduced at trial as evidence." Appellant points out that "Trooper Murray was not an expert on drug recognition" nor was he an "expert on chemical analysis of controlled dangerous substances." Appellant concludes that "the trial judge committed reversible error by admitting [Trooper Murray's] testimony about appellant having a vial in his pocket [that] contained PCP." The State agrees with appellant that, "[b]ecause Trooper Murray

was neither offered nor accepted by the trial court [as] an expert witness, . . . [Trooper Murray] should not have been permitted to testify, as a matter of lay opinion that he 'determined' that the substance in the vial was PCP." We also agree.

Whether or not a trial court may admit expert testimony is governed by Rule 5-702, which states:

> **Expert testimony** may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by **knowledge, skill, experience, training, or education**, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

(Emphasis added). Conversely, lay testimony is governed by Md. Rule 5-701, which states:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

As pointed out by both appellant and the State, Rules 5-701 and 5-702 "prohibit the admission as 'lay opinion' of testimony based upon *specialized knowledge, skill, experience, training, or education*." *Ragland v. State*, 385 Md. 706, 725 (2005) (emphasis added); *see also Wilder v. State*, 191 Md. App. 319, 368 (2010).

Here, Trooper Murray testified as follows:

> [Prosecutor]: And in your ten years as a Maryland State Trooper, have you had training in the detection of controlled dangerous substances?
>
> [Trooper Murray]: That is correct.

[Prosecutor]: Okay. And can you tell us what that training is?

[Trooper Murray]: The ARIDE Class and training, and the – just the Police Academy when I was in training in Sykesville.

[Prosecutor]: I'm sorry?

[Trooper Murray]: Training in Sykesville –

[Prosecutor]: Okay.

[Trooper Murray]: –from Maryland State Commission.

***

[Prosecutor]: And through **your knowledge, training, and experience,** what is PCP?

[Trooper Murray]: It's a chemical substance that [ ] causes disorientation. The pupils can be dilated.

[Prosecutor]: Keep your voice up for us.

[Trooper Murray]: The pupils can be dilated. Also you can, you know, the incohesiveness (sic). You're unable to, you know – you know, hold a, you know, conversation. You also can be, you know, sweating.

[Prosecutor]: Okay.

[Trooper Murray]: Perspiration.

[Prosecutor]: **And through your knowledge, training, and experience**, is PCP a controlled dangerous substance?

[Trooper Murray]: That is correct.

[Appellant's Counsel]: Objection.

The Court:	Overruled.
	***
[Prosecutor]:	Okay. At that point, what did you do next?
[Trooper Murray]:	After I arrested him, a search incident to arrest, **I found a vial of a substance which I determined to be PCP.**
[Appellant's Counsel]:	Objection.
The Court:	Overruled.

(Emphasis added).

Here, as both appellant and the State point out, Trooper Murray was not offered and accepted by the trial court as an expert witness. Trooper Murray's testimony as to the chemical identity of the contents of the vial went beyond opinions or inferences that are "(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Md. Rule 5-701. Instead, Trooper Murray relied on his "knowledge, training, and experience" to determine that the vial contained PCP. *See* Md. Rule 5-702. Therefore, we conclude that the trial court committed reversible error by admitting Trooper Murray's testimony regarding the chemical composition of the contents of the vial seized from appellant's SUV.

IV. Testimony that Appellant Admitted to Taking PCP Recently

In his fourth issue presented, appellant asks:

> Whether the trial court committed reversible error by allowing (despite objection by appellant's counsel), the State Trooper to testify that appellant admitted that he had recently consumed phencyclidine (PC[P]), where the

> alleged statement was made in response to custodial interrogation; even though the trooper admitted that he had not given appellant the advice of the rights to counsel under the Sixth Amendment to the United States Constitution, and right against self-incrimination as provided by the Fifth Amendment to the United States Constitution, as required by *Miranda v. Arizona*?

No argument appears in appellant's brief on this issue.

As explained, *supra,* we will not address an appellate issue where appellant has not set forth argument in support thereof. *See* Md. Rule 8-504(a)(6) (stating that a party must present "[a]rgument in support of the party's position"); *Esham*, 43 Md. App. at 457–58 (stating that "where a party initially raised an issue but then failed to provide supporting argument, this Court has declined to consider the merits of the question so presented but not argued"). We therefore will not address appellant's fourth issue.

V. Testimony that Appellant Appeared Impaired by PCP

Appellant contends that the trial court "committed reversible error by allowing (over objection), [Trooper Murray] to testify that appellant was driving while impaired by PCP." Appellant argues that Trooper Murray's testimony that appellant was driving while impaired "violated Rule 5-704 by providing an opinion on an ultimate issue in the case, namely the mental state of appellant while driving."

Maryland Rule 5-704 states:

> (a) In General. Except as provided in section (b) of this Rule, testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact.
>
> (b) Opinion on Mental State or Condition. An expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may not state an opinion or inference as to whether the defendant had a mental

> state or condition constituting an element of the crime charged. That issue is for the trier of fact alone. This exception does not apply to an ultimate issue of criminal responsibility.

We have explained that, "[e]ven a lay witness may offer an opinion on an ultimate issue of fact, . . . if the opinion is rationally based on the perception of the witness and helpful to the determination of the trier of fact." *Zachair, Ltd. v. Driggs*, 135 Md. App. 403, 438 (2000).

Appellant, however, failed to provide us with a specific citation to the record for Trooper Murray's trial testimony at issue, and we can find no instance where Trooper Murray testified "that appellant was driving while impaired by PCP." We therefore decline to address this issue. *See Van Meter v. State*, 30 Md. App. 406, 408 (1976) (noting that this Court "cannot be expected to delve through the record to unearth factual support favorable to appellant and then seek out law to sustain his position").

Even if we were to address this issue, we perceive no error. As we stated, *supra*, Trooper Murray could not testify about the chemical composition of the contents of the vial. It is acceptable, however, for Trooper Murray to testify regarding his observations of appellant's appearance and actions, such as noting that appellant's eyes were red and glassy, he was "unsteady on his feet," and he was sweating profusely. Such testimony did not "invade[ ] the province of the jury [or judge] by expounding upon the ultimate issue of guilt or innocence." *Cantine v. State*, 160 Md. App. 391, 405 (2004).

VI. The Sufficiency of the Evidence

Appellant argues that "[c]onsideration of the totality of evidence clearly establishes that the weight of properly admitted evidence was insufficient to establish guilt."

Appellant explains that "[t]he function of the Court of Special Appeals on appeal in a non-jury case, is to determine from the evidence, and proper inference therefrom, whether evidence was sufficient to warrant the finding of guilt beyond a reasonable doubt." Without further elaboration, appellant concludes that "[t]he evidence was clearly insufficient to establish [guilt]," and "the Court should reverse appellant's convictions, and vacate the sentence imposed by the [circuit] [c]ourt."

The State responds that "[t]his Court should decline to address this contention because [appellant] does not actually advance any substantive argument to support it." The State argues that it "cannot meaningfully respond to arguments that [appellant] does not actually make." Specifically, the State asserts that "[appellant] does not identify which of the four driving offenses this blanket assertion relates to, nor does [appellant] identify the specific element or elements as to which he believes the evidence was legally insufficient, or why." The State contends, in the alternative, that, if this Court does "reach the issue, it should hold that the evidence was sufficient."

Although somewhat unclear from his brief, appellant seems to argue that it is this Court's duty to "determine . . . whether evidence was sufficient" to support appellant's convictions by searching the record. In support of this contention, appellant cites *Bury v. State*, 2 Md. App. 674, 677 (1968), which states:

> Our function on appeal in a non-jury case, is not to determine whether, on the evidence, we might have reached a different conclusion, but rather to determine from the evidence, and the proper inferences therefrom, whether it was legally sufficient to warrant the finding of the trial judge that the defendant was guilty beyond a reasonable doubt.

Bury, however, did not address the argument advanced by the State here, namely, that in this Court appellant did not set forth "any substantive argument" in support of his contention that the evidence was insufficient to support his convictions. As we stated previously, for appellate review to be preserved, an appellant must raise and argue an issue. *See* Md. Rule 8-504(a)(6); *Esham*, 43 Md. App. at 457–58. Because appellant did not provide argument as to why the evidence was insufficient to support any one or more of his convictions, the sufficiency of the evidence issue is not preserved for our review.

Even if we were to address the sufficiency of the evidence issue, for the reasons explained, *infra*, we would hold that there was sufficient evidence to convict appellant of Count I, failure to control the speed of a motor vehicle to avoid a collision pursuant to TR § 21-801(b); Count II, negligent driving pursuant to TR § 21-901.1(b); Count IV, driving while impaired by a controlled dangerous substance pursuant to TR § 21-902(d); and Count V, driving while impaired by drugs or alcohol pursuant to TR § 21-902(c)(1).

In a jury trial, "Maryland Rule of Procedure 4-324 requires an appellate court to review the legal sufficiency of the evidence if, at the close of all of the evidence, a timely motion for a judgment of acquittal has been made by the defendant." *Chisum v. State*, 227 Md. App. 118, 124 (2016). When the defendant appeals a verdict from a bench trial, however, "appellate review of the legal sufficiency of the evidence is automatic and does not require a motion by the appellant." *Id.* at 129. "The reviewing authority is spelled out in Maryland Rule 8-131(c)[.]" *Id.* at 125. That rule states:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due

> regard to the opportunity of the trial court to judge the credibility of the witnesses.

Md. Rule 8-131(c).

Appellate review of the legal sufficiency of the evidence, however, can include improperly admitted testimony. *See Emory v. State*, 101 Md. App. 585, 629–30 (1994). In *Emory*, Judge Charles E. Moylan, Jr., explained:

> As we have discussed at length, such evidence should not have been admitted. At a retrial, it will not be admitted. At the moment, however, we are assessing the legal sufficiency of the evidence not at the trial that *will be*, but at the trial that *was*. This is one of those rare occasions when the propriety of the evidence has nothing to do with the weight we may give it or, indeed, with whether we may give it any weight. **We measure that legal sufficiency on the basis of all of the evidence in the case, that which was improperly admitted just as surely as that which was properly admitted.**

Id. (bold added) (italics in original). *See Marlin v. State*, 192 Md. App. 134, 152 n.5 (2010) ("[E]vidence improperly admitted at a trial may be considered in evaluating the sufficiency of evidence on appeal.").

A. TR § 21-801(b)

The trial court found appellant guilty of TR § 21-801(b). That provision states:

> At all times, the driver of a vehicle on a highway **shall control the speed of the vehicle as necessary to avoid colliding with** any person or **any vehicle** or other conveyance that, in compliance with legal requirements and the duty of all persons to use due care, is on or entering the highway.

(Emphasis added).

We have explained:

> [TR § 21-801(b)] requires the driver to control the vehicle's speed when a collision with a person or vehicle might occur. Read in its entirety, [TR] § 21-801 **plainly requires drivers to reduce speed**, **from what otherwise would be a lawful maximum speed, to that which is reasonable or**

> **prudent in light of existing conditions that present an "actual or potential danger."**

Warren v. State, 164 Md. App. 153, 163 (2005) (emphasis added). Here, Scott-Black testified that she was stopped at a red light when she felt appellant's vehicle "bump" into the back of her vehicle. The evidence that appellant ran into the back of Scott-Black's vehicle with his vehicle would allow a rational finder of fact to conclude that appellant did not "control the speed of the vehicle as necessary to avoid colliding with" Scott-Black's vehicle. *See* TR § 21-801(b). We therefore hold that there was sufficient evidence to find appellant guilty of violating TR § 21-801(b).

B. TR § 21-901.1(b)

The trial court found appellant guilty of TR § 21-901.1(b). TR § 21-901.1(b) states: "A person is guilty of negligent driving if he [or she] drives a motor vehicle in a careless or imprudent manner that endangers any property or the life or person of any individual." As the State points out, because appellant's vehicle struck Scott-Black's vehicle, the evidence supports the inference that appellant was driving in a "careless or imprudent manner." *See Lewis v. State*, 398 Md. 349, 377 (2007) (Rodowsky, J., dissenting) (finding that "TR § 21–901.1(b) makes plain that the negligent driving need merely *endanger* person or property. There is no requirement for impact"). Moreover, because appellant's vehicle ran into the back of Scott-Black's vehicle, a rational finder of fact could conclude that appellant endangered Scott-Black's property. We therefore hold that there was sufficient evidence to find appellant guilty of violating TR § 21-901.1(b).

C. TR § 21-902(d)

The trial court found appellant guilty of TR § 21-902(d). TR § 21-902(d)(1)(i) states:

> A person may not drive or attempt to drive any vehicle while the person is impaired by any controlled dangerous substance, as that term is defined in § 5-101 of the Criminal Law Article, if the person is not entitled to use the controlled dangerous substance under the laws of this State.

In addition to her testimony about the collision, Scott-Black testified that appellant "seemed to have trouble walking" and that "[h]e had trouble balancing." Trooper Murray observed that appellant was "staggering and had to hold onto his vehicle to keep his balance." Trooper Murray testified that appellant's eyes were red and glassy, that appellant was sweating profusely, and that appellant was "very unsteady on his feet." Trooper Murray smelled a "sweet odor of a chemical substance . . . emanating from [appellant's] breath and pores" that he identified from his training and experience as PCP, a controlled dangerous substance. Appellant also admitted that "recently he took some PCP[.]" Finally, Trooper Murray testified that appellant refused to submit to an intoximeter test or a blood test. *See* Md. Code, Cts. & Jud. Proc. § 10-309(a)(2) ("The fact of refusal to submit [to an intoximeter test] is admissible in evidence at the trial."). From this evidence, a rational finder of fact could conclude that appellant was driving while impaired by a controlled dangerous substance. Accordingly, we hold that there was sufficient evidence to find that appellant was guilty of violating TR § 21-902(d).

D. TR § 21-902(c)(1)

The trial court found appellant guilty of violating TR § 21-902(c)(1). TR § 21-902(c)(1)(i) states: "A person may not drive or attempt to drive any vehicle while so far impaired by any drug, any combination of drugs, or a combination of one or more drugs and alcohol that the person cannot drive a vehicle safely."

As we have explained, *supra*, there was sufficient evidence for a rational finder of fact to conclude that appellant was driving while impaired by a controlled dangerous substance. Additionally, a rational factfinder could conclude that appellant could not drive his vehicle safely because he drove his vehicle into the back of Scott-Black's vehicle. Therefore, we hold that there was sufficient evidence to find appellant guilty of TR § 21-902(c)(1).

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.